FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-201

JOHN B. GREENHOLTZ, Chairman of the Nebraska Board of Parole, *et al.*,

Petitioners,

v.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICUS CURIAE THE NATIONAL PRISON PROJECT of the AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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INTEREST OF AMICUS CURIAE

The National Prision Project of the American Civil Liberties Union Foundation, Inc. is a non-profit, tax-exempt New York corporation engaged in efforts, through staff attorneys and other employees, to develop rehabilitative correctional programs and facilities, to devise model prison procedures and regulations, to improve prison conditions in the United States and to function as a national resource center for law-

yers, legislators, corrections officials and courts. It is the larges project of its kind in the country.

In furtherance of the activities described above, the Project's staff attorneys and other employees are engaged in the counseling and representation of prisoners incarcerated in penal institutions throughout the country. The Project has been involved as counsel or as *amicus* in many important parole cases, *e.g., Scott v. Kentucky Parole Board,* 429 U.S. 60 (1976) (remanded to consider mootness), *reaffirmed sub nom. Bell v. Kentucky Parole Board,* 556 F.2d 805 (1977), *cert. denied,* 434 U.S. 960 (1978), as well as other due process and related prison cases, *e.g., Wolff v. McDonnell,* 418 U.S. 539 (1974); *Montanye v. Haymes,* 427 U.S. 236 (1976); *Pell v. Procunier,* 417 U.S. 817 (1974); *Preiser v. Rodriguez,* 411 U.S. 475 (1973); *Pugh v. Locke,* 406 F. Supp. 318 (M.D.Ala. 1976), *aff'd and remanded, sub nom. Newman v. Alabama,* 559 F.2d 283 (5th Cir. 1977), *cert. den. in relevant part, sub nom. Alabama v. Pugh,* __ U.S. ___ , 98 S.Ct. 3057 (1978).

SUMMARY OF ARGUMENT

Amicus Curiae, the National Prison Project, agrees with the position taken by the United States in their brief as *amicus curiae* that Nebraska law gives prisoners eligible for parole a legitimate claim of entitlement to release (Brief of the United States, pp. 31-36) and that the Due Process Clause requires Nebraska parole officials to give prisoners a fair opportunity to be considered for parole. (Brief of the United States, pp. 38-46). We do not agree with the limitations on the nature of the process due which are argued by the United States.

However, in the light of the inferences in the brief for the Petitioners that the State of Nebraska could or would

amend their parole statutes if this Court were to affirm the holding that the State of Nebraska had created a prisoner entitlement and liberty interest in applications for parole release,[1] we will limit our brief to the contention that, given the present realities of the parole release process, that process implicates interests in liberty protected by the Due Process Clause of the Fourteenth Amendment. Therefore, these important interests should be protected in the manner set forth by this Court in *Morrissey v. Brewer,* 408 U.S. 471 (1972) and *Wolff v. McDonnell,* 418 U.S. 539 (1974) irrespective of a state created entitlement.

ARGUMENT

PAROLE RELEASE PROCEEDINGS IMPLICATE INTERESTS IN LIBERTY PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The realities of the parole release process.

Since *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969) (due process before garnishment of wages), this Court, in an almost unbroken line of cases, has applied the safeguards of the Due Process Clause to a host of situations where liberty and property interests formerly thought to be exempt from constitutional protection were threatened by unchecked government action. See, *e.g. Goss v. Lopez,* 419

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1 ". . . , Nebraska would at least have had an opportunity to cure the situation by amending its statute." (pet. Br. p. 18).

"If forced into such a position we suspect that many states will simply do away with discretionary parole, and opt for fixed sentences." (Pet. Br. p. 36).

U.S. 565 (1975) (due process before school suspensions); *Taylor v. Hayes*, 418 U.S. 488 (1974) (due process before contempt citation); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (due process may require counsel in probation revocation hearings); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (due process before state-assisted repossession); *Bell v. Burson*, 402 U.S. 535 (1971) (due process before suspension of driver's license); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (due process before public posting of name forbidding individual from purchasing liquor); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (due process before termination of welfare benefits). Although the content of the prescribed protections has been held to vary from case to case, each recognizes the quintessential value of procedure in our system of government, "for it is procedure that marks much of the difference between rule by law and rule by fiat." *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971). Implicit in these decisions is a respect for the individual adversely affected by important decisions of governmental bodies and a healthy concern over the integrity of the decisionmaking processes employed by the multitude of agencies wielding government power. As one influential commentator has observed in a context directly relevant to this case:

> "A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual no matter how degenerate. It is a radical departure from tradition to accept for a defined class of persons, even criminals, a regime in which their right to liberty is determined by officials wholly unaccountable in the exercise of their power and through processes which deprive them of an opportunity to be heard on the matters of fact and policy which are relevant to the decisions made." Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904, 923 (1962).

In the administration of correctional justice, the general area of concern in this case, the principles animating the extension of due process in the recent cases of this Court have been solidly rooted. "There is no iron curtain drawn between the Constitution and the prisoners of this country. [T]he position [that] implies that prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause [is] plainly untenable." *Wolff v. McDonnell*, 418 U.S. at 555-56. See also *Gagnon v. Scarpelli*, 411 U.S. 778 (1973): *Morrissey v. Brewer*, 408 U.S. 471 (1972). Yet in spite of these recent developments, one major area thus far has remained immune from this Court's scrutiny: the parole release process, which has been accurately described by the House Judiciary Committee in its Report on the Parole Commission and Reorganization Act of 1976, 18 U.S.C. §4201 *et seq.*:

> "The parole system has long been recognized as the single most inequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map."
>
> – H.R. Rep. No. 94-184, 94th Cong., 1st Sess. at 3 (1975)

It is the overwhelming sentiment of careful observers of parole release decisionmaking that parole boards, as they currently function in most jurisdictions, are "one of the last bastions of unchecked and arbitrary power in America." California Assembly's Select Committee on Administration of Justice, *Parole Board Reform in California – Order Out of Chaos* 15 (1970). A respected federal judge has described the system as one in which "parole officials carry on for the most part the motif of Kafka's nightmares." Frankel, *Law-*

lessness in Sentencing, 41 U. Cin. L. Rev. 1, 15 (1972). A number of national task forces, study commissions, and observers who have reviewed the performances of parole boards have reached conclusions substantially similar to the one voiced by the subcommittee of the House Judiciary Committee:

> "Everywhere the Subcommittee went they found universal dissatisfaction with the parole process. Wardens claimed that it was a major cause of institutional tension. Inmates felt that they were being treated inequitably. Judges felt that discrepancies within the system made a mockery of the sentencing process." H.R. Rep. No. 94-184, 94th Cong., 1st Sess. at 2 (1975).

See also National Advisory Commission on Criminal Justice Standards and Goals, *Corrections,* 389-435 (1975); Citizens' Inquiry on Parole and Criminal Justice, Inc., *Prison Without Walls: Report on New York Parole,* passim (1975); Official Report of the New York State Commission on Attica, *Attica,* 93-102 (1972),[2] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 85-86 (1967); D. Stanley, *Prisoners Among Us: The Problem of Parole,* passim (The Brookings Institution, 1976); K. Davis, *Discretionary Justice* 126-41 (1969); F. Cohen, *The Legal Challenge to Corrections* 26-63 (1969); Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology,* 22 Am U.L. Rev. 477 (1973); Parsons-Lewis, *Due Process in Parole-Release Decisions,* 60 Calif. L. Rev. 1518 (1972); Bixby, *A New Role for Parole Boards,* 34 Fed. Prob. 24 (June 1970).

[2] Compellingly, the Attica Commission pinpointed the parole release procedures followed by the New York State Board of Parole as one of the central causes of inmate frustration and unrest leading to the tragedy at Attica: "[A]s presently operated, parole procedures are unfair, and appear to inmates to be even more inequitable and irrational than they are." Id at xviii.

Embodied in a *realistic* concept of parole are three relevant elements. First, as the former Chairman of the U.S. Board of Parole has noted, "the parole process is inseparable from the sentencing process." Sigler, *Abolish Parole?* 39 Fed. Prob. 42, 47 (June 1975). "[T]oday parole boards and judges are expected to exercise their discretion to determine the proper sentence . . . parole legislation involves essentially a delegation of sentencing power to parole boards. The parole decision involves many of the same kinds of factors that are involved in the original sentencing decision." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 86 (1967). In short, "the function of parole boards at release hearings and of judges at sentencing are virtually identical." Parsons-Lewis, *Due Process in Parole Release Decisions,* 60 Cal. L. Rev. 1518, 1534 (1972). "Parole occupies a central role in the sentencing and correctional system. Once an offender is sentenced to prison, it is largely the parole board which determines when he will be released, under what conditions, and whether his conduct under supervision warrants imprisonment." *Abolish Parole?* Summary of Report Submitted to the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, at 1 (September 1978).

Second, release on parole is not an exceptional stroke of good fortune, saving a few prisoners from serving their full term. In 1976, 69% (approximately 96,000 individuals) of

all those released from prison were released on parole, a figure which has steadily increased since 1966. In 1977, approximately 109,700 prisoners were released from prison in this country through the parole process, another substantial increase.[3] "Parole is the predominant mode of release for prison inmates today, and it is likely to become even more so." National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* 389 (1973).

Third, parole release is not "leniency". Studies have shown that "actually prisoners serve as much time in confinement in jurisdictions where parole is widely used as in those where it is not." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 62 (1967). According to a recent survey, the great majority of federal judges consider parole in sentencing and approximately one-half sentence on the assumption that the prisoner will be released after serving one-third of it. Two-thirds of the judges said that they expected sentenced defendants to be released before serving the maximum sentence imposed. Project, *Parole Release Decision Making and the Sentencing Process,* 84 Yale L.J. 810, 882 n. 361 (1975). Thus, "today . . . the legal maximum is not considered the norm. Parole . . . should not be considered any more a matter of grace than any sentence which is less than the maximum provided for by statute." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 86 (1967).

One additional aspect of parole release decision-making, apparently relied on by the Petitioner and the United States

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[3] *Parole in the United States: 1976 and 1977,* Uniform Parole Reports, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service, July 1978, pp. 11, 40.

for excluding any of the strictures of minimum due process from the confines of the parole hearing, deserves some comment. Their apparent argument that due process would unduly intrude upon the discretionary and predictive judgments made by parole boards, conflicts with the operative (as opposed to espoused) factors motivating parole release decisions and with prior decisions of this Court rejecting regimes of unbridled discretion exercised under the guise of benevolent expertise. See *Morrissey v. Brewer, supra* at 483.

As recognized by Professor Kadish, the argument that legal rules will only operate to impair the reliability of expert judgment is without proper foundation for five reasons:

(1) The goal of rehabilitation– a main tenet of parole release decisionmaking – is not exclusive in our society. "Reverting to elementary principles for a bit, we ought to recall that individualized justice is *prima facie* at war with such concepts, at least as fundamental, as equality, objectivity, and consistency in the law." M. Frankel, *Criminal Sentences: Law Without Order,* 10 (1973);

(2) Expert judgment contains premises and assumptions that deserve challenge and careful scrutiny;

(3) The decision to release a prisoner is often predicated on reasons unrelated to rehabilitation, *e.g.,* prison overcrowding. See *New York Times,* January 5, 1976, at 1, Col.2 (city ed.) (at least six southern states are releasing prisoners on parole because of prison overcrowding);

(4) Correctional judgments turn on matters of historical fact (*e.g.,* the nature and number of past arrests, employment status, etc.) as well as scientific ones; and

(5) Overburdened parole boards, like other government agencies, commit errors. Kadish, *Legal Norm and Discretion*

in the Police and Sentencing Processes, 75 Harv. L. Rev. 904, 924-28 (1962).

The insight into "the function of parole in the correctional process" with which the Chief Justice began the opinion in *Morrissey* neatly sums up the discussion of the realities of the parole system, and provides a logical point of departure in analyzing the nature of the prisoner's interest in parole release:

> "During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. . . . Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison." 408 U.S. at 477.

B. The nature of a prisoner's interest in parole embodies real substance: Parole is not a condition of confinement.

Unlike the situation in *Meachum v. Fano,* 427 U.S. 215, 224 (1976), where "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the state may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution", the issue in this case is not where or how, but whether that person shall be imprisoned.

A prisoner considered for parole will either continue to be imprisoned and deprived of his freedom or conditionally released and permitted to resume a role in the larger society. Thus, unlike in *Meachum,* the issue at the parole release hearing is liberty, and that liberty is protected by the Due Process Clause of the Fourteenth Amendment.

This Court said in *Morrissey v. Brewer,* 408 U.S. 471, 482 (1972); "The liberty of a parolee, although indeterminate, includes many of the core values of unqualifed liberty . . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." Comparing the parole revocation decision to parole release, the Second Circuit Court of Appeals said that, "the stakes are the same: conditional freedom versus incarceration." *U.S. ex rel. Johnson v. Chairman, New York State Board of Parole,* 500 F.2d 925, 928 (2d Cir.), *vacated as moot,* 419 U.S. 1015 (1974). While the degree of hardship imposed by the denial of parole and the revocation of parole may differ, the nature of the interests involved are identical. Any difference between the grant and revocation of parole would affect the degree of the procedural protection to be accorded, but not the applicability of the Due Process Clause.

This Court recognized in *Moody v. Daggett,* 429 U.S. 78 (1976), that the denial of this liberty is the factor in parole revocation cases which implicates the Due Process Clause. Because the petitioner in *Moody* could not gain release by the process which he sought, he had no right to an immediate hearing. "With only a prospect of future incarceration which is far from certain, we cannot say that the parole violator warrant has any present or inevitable effect upon the liberty interests which *Morrissey* sought to protect." *Id.* at 87. In contrast, the parole authority "holds the key to the lock of the prison." *Childs v. U.S. Board of Parole,* 511

F.2d 1270, 1278 (D.C. Cir. 1974). The Senate Judiciary Committee recognized that "the denial of parole is in a limited sense the taking of an individual's liberty, or at least the opportunity for him to obtain liberty. The Constitution requires due process of law. . .". S. Rep. 94-369, 94 Cong., 1st Sess. 19 (1975).

A person eligible for parole, like a person subject to parole revocation, will either be imprisoned or have some measure of conditional freedom. Liberty is precisely what is at stake, and that liberty must be afforded the protection of the Due Process Clause of the Constitution.

CONCLUSION

For the foregoing reasons, the judgement of the Court of Appeals should be affirmed.

Respectfully submitted,

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